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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 578

HEARST CONSOLIDATED PUBLICATIONS, INC., THE HEARST CORPORATION, AND IGOR CASSINI, *Petitioners,*

v.

FREDERICK H. HOPE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HEARST CONSOLIDATED PUBLICATIONS, INC., THE HEARST CORPORATION, and IGOR CASSINI, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause on September 7, 1961.

OPINIONS BELOW

The opinion and dissenting opinion in the court below (Appendix A, *infra,* pp. A1-A24) have not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra*, p. A25) was entered on September 7, 1961.

Timely petitions for rehearing and for a rehearing in banc were denied on October 13, 1961 (Appendix B(2),(3), *infra*, p. A26).

The jurisdiction of this Court is involked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In an action for libel brought in Federal court in New York because of diversity of citizenship, plaintiff complained of a "blind item," i.e., one using no names. He offered evidence that others in the community readily recognized the item as referring to him. If the action had been brought in a New York State court, this evidence would have been excluded. The District Judge admitted it in reliance on Rule 43(a), F.R. Civ. P., and the jury awarded plaintiff substantial damages.

The question presented is whether, in view of the principles enunciated in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, and *Guaranty Trust Co.* v. *York*, 326 U.S. 99, the Federal court was justified in relying on Civil Rule 43(a) to admit evidence having so obvious an influence on the outcome of a case in a situation where it would have been excluded by the State court.

RULE OF CIVIL PROCEDURE INVOLVED

Rule 43(a), F.R. Civ. P., provides as follows:

> **"Rule 43. Evidence**
>
> **"(a) Form and Admissibility.** In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

STATEMENT

For purposes of this petition, we are content to take the statement of facts from the first portion of the majority opinion below (*infra*, pp. A2-A3), as follows:

"Plaintiff is a young Palm Beach attorney who formerly served as a special agent for the Federal Bureau of Investigation. Defendant Hearst Consolidated Publications, Inc. is the owner and publisher of the New York Journal-American; Cassini is the author of the 'Cholly Knickerbocker' column which appears daily in the Journal-American; The Hearst Corporation operates a newspaper service syndicate, King Features Syndicate, which reprints and sells numerous feature columns, including Cholly Knickerbocker, to various newspapers throughout the United States.

"The complaint [brought in the United States District Court for the Southern District of New York on grounds of diversity of citizenship] alleged that defendants defamed Hope in a Cholly Knickerbocker column which appeared in the April 21, 1958 Journal-American, the Palm Beach Times of a few days later and numerous other newspapers. The claimed libelous item read as follows:

> " 'CHOLLY KNICKERBOCKER SAYS:
>
> STORY OF RICH MAN'S WIFE HAS PALM BEACH GOSSIPING
>
> Palm Beach is buzzing with the story that one of the resort's richest men caught his blonde wife in a compromising spot the other day with a former FBI agent. Cameras, screams of anguish and the whole nawsty bit * * *'

"The publication of such a gossip paragraph using no names, known in 'the trade' as a 'blind item,' raised sharply at trial the issue of its applicability to the plaintiff. Hope claimed that he and most others in the community readily recognized the item as referring to himself and to Mrs. Gregg Sherwood Dodge, wife of Horace Dodge—wealthy members of the so-called Palm Beach 'International' or 'Jet Set.' Hope testified that he, as a comparatively new member of the County Solicitor's Office, had received extensive publicity as an ex-F.B.I. agent. His evidence was that he, unlike a number of other former agents in Palm Beach, *was known primarily as an ex-agent*; further, that he was the only one of the former F.B.I. men who traveled in the resort's high society circles.

"In addition to his own testimony, plaintiff offered the live testimony of James J. Lynch, who had call d

Hope's attention to the column, and the deposition evidence, by written interrogatories, of approximately a dozen other citizens of Palm Beach. After having qualified those witnesses as being residents of the area and acquainted with Hope—and as having read the newspaper item in question—plaintiff's counsel asked them to 'state whether at the time you read the article * * * you formed a conclusion as to the name of the former FBI agent referred to in such article.' Interrogatory 20 requested the deponent to 'state the name of the person you believed to be the former FBI agent referred to in the article * * *' and the next query continued, 'state the reason or reasons why you believed such plaintiff to be the former FBI agent referred to in the article * * *' Similar questions were asked concerning the witnesses' recognition of Mrs. Dodge as the lady involved. Plaintiff was allowed, over objection, to read these foregoing questions and the answers of the witnesses to the jury * * *," which returned a verdict of $7,500 compensatory damages and $12,000 punitive damages against each defendant, or $19,500 against each (R. 251a), making a total verdict of $58,500, on which judgment was duly entered (R. 262a).

In admitting the evidence in question, the District Court (R. 109a-111a) relied on Civil Rule 43(a), quoted above; and (*infra*, p. A3) "the correctness of that ruling on admissibility of evidence is the principal issue on this appeal" to the court below, and is the only issue here.

The court below said (*infra*, p. A4), "No relevant Federal statute has been called to our attention and the New York case law calls for exclusion." But the court below went on to hold that, in the present action

for libel tried to a jury, the evidence in question was admissible under the "equity clause" of Rule 43(a), viz., "under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity." Accordingly, it affirmed the judgment in favor of the plaintiff.

Judge Moore dissented, saying (*infra*, pp. A21, A24):

"The importance of this case lies in the fact that, in my judgment, it overrides the principles and the spirit of the Supreme Court's *Erie* v. *Tompkins* and *Guaranty Trust Co.* v. *York* decisions. If that Court's statement that 'the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court' (326 U. S. 99, 109), is to be taken at all seriously, we have a situation in which a mass of evidence of vital importance in a jury case was admitted in a Federal court which even the majority concedes would be inadmissible in the same case in the State court located across the street. And all this because of the fortuitous circumstance of diversity.

* * * *

"New York State in its court decisions has decided that 'truth finding' is best achieved by exclusion; other States have held the contrary. In final analysis, therefore, in my opinion, the majority are, in effect, holding that in a Federal court whether the action be common law or equity, the judge can receive any evidence he may choose to accept under broad principles of federal law (whatever they may be) because some court somewhere might in an equitable action admit the evidence.

This I believe puts an end to any of the relevant principles of *Erie* v. *Tompkins* and *Guaranty Trust* v. *York*."

REASONS FOR GRANTING THE WRIT

First. This case strikes at the very heart of Federal diversity jurisdiction, resurrecting as it does through interpretation of Civil Rule 43(a) the ghost of *Swift* v. *Tyson*, 16 Pet. 1, and serving up under the guise of a rule of evidence that "federal general common law" which *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78, declared to be non-existent.

It is not necessary here to attempt distinctions between substantive law and procedure, for two reasons that lead to the same result:

(1) To the extent that the admissibility of the evidence here in question is to be deemed procedural, its admission plainly led to a different outcome in the litigation; as the dissenting judge said (*infra*, p. A21), "testimony * * * of several witnesses that they had in their own minds formed the conclusion that the news article referred to plaintiff * * * must be considered as highly material. But this, of course, was the very conclusion which was for jury determination upon the facts. That a jury would not have been strongly influenced by such speculative conclusions is scarcely open to doubt."

(2) To the extent that the New York courts reject such evidence, that jurisdiction in effect declares that "blind items" not plainly and inescapably pointing at a unique individual can not be shown to be defamatory; and this makes the rule one of substance, as indeed both opinions below recognize (*infra*, pp. A17, A23-A24).

On either view, the result reached below does violence to the principle of *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 109, that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."

Second. The court below went astray because of its failure to recognize that the Federal Rules of Civil Procedure antedate *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

Those Rules were adopted by this Court on December 20, 1937 (308 U. S. 649; J. Sup. Ct., Oct. T. 1937, p. 115), whereas the *Erie* case was decided, on constitutional grounds, on April 25, 1938. Therefore anything said in Rule 43(a) must be dealt with, not as "a transcendental body of law outside of any particular State" (Holmes, J., dissenting, in *Black & White Taxi. Co.* v. *Brown & Yellow Taxi. Co.,* 276 U. S. 518, 532, 533), which a Federal court is free to adopt or reject as it may see fit, but rather, see *Angel* v. *Bullington,* 330 U. S. 183, 192, as any other pre-April 1938 decisions or statements or pronouncements of this Court that now "are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie R. Co.* v. *Tompkins.*" Even in equity cases brought in or into the Federal courts by the accident of diversity of citizenship, therefore, the "equity clause" of Rule 43(a) can not now justify following a rule contrary to that of the State in which the Federal court sits. *A fortiori,* then, there is no justification for applying that clause here, since, as the dissenting judge below very properly said (*infra,* p. A24), "This jury case could not possibly have been brought in equity."

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie*, at 78. Hence the Federal courts are still free to fashion their own rules of evidence in criminal cases, see F. R. Crim. P., Rule 26,* but not, since *Erie*, in diversity cases, except possibly in a rigidly circumscribed area. Therefore most of the decisions relied on in the opinion below to show what the Federal equity rule prior to *Erie* may have been, or was believed to be, are, very obviously, simply irrelevant.

Third. If it is deemed necessary, in addition to the foregoing considerations, to put forth more formal grounds for review, those are present also, in the shape of a conflict of decisions among the circuits that is duly adumbrated in the opinion below (Appendix A, *infra*, pp. A7-A9, A13):

The Fifth Circuit reads Rule 43(a) as does the Second in the case at bar; see *Monarch Insurance Company of Ohio* v. *Spach*, 281 F. 2d 401. The Third, on the other hand, follows the State law, see *Wright* v. *Wilson*, 154 F. 2d 616, and *Gordon* v. *Robinson*, 210 F. 2d 192, and its views have been followed by the Eighth, in *Schillie* v. *Atchison, Topeka & Santa Fe Railway Co.*, 222 F. 2d 810, and by the Ninth, in *Potlatch Oil & Refining Co.* v. *Ohio Oil Co.*, 199 F. 2d 766.

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* "Rule 26. Evidence

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Fourth. In construing § 34 of the Federal Judiciary Act of 1789 according to the *Swift* v. *Tyson* principle, "this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." *Erie,* at 80. An identical invasion is effected by the Second Circuit's construction of Civil Rule 43(a) in the case at bar.

CONCLUSION

The ruling below turns back the clock. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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